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Issue Date: 15 January 2003

In the Matter of

Larry L. Jacobs,
Claimant

v.

Tartan Terminals,
Employer

Case No.: 2002-LHC-1581, 1582
OWCP No.: 04-35173, 04-35370

DECISION AND ORDER
AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Worker's Compensation Act, as amended, 33 USC § 901, et seq. (hereinafter LHWCA). A hearing was held before me in Baltimore, Maryland, on October 4, 2002, at which time the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the hearing, Claimant's Exhibits 1 through 14, Employer's Exhibits 1 through 62, and ALJ Exhibits 1 through 6 were admitted into evidence. The Claimant's post-hearing brief was filed on December 31, 2002; the Employer's post-hearing brief was filed on January 3, 2003. I have reviewed and considered these briefs in making my determination in this matter.

I. Statement of the Case

Testimony of the Claimant

The Claimant was born on September 5, 1951; he was 51 years old at the time of the hearing. He worked as a longshoreman for 31 years (Tr. 59-60). For the five years preceding his injury, he worked over 3,000 hours a contract year, or an average of more than 40 hours a week (Tr. 61, CX 9). The Claimant was employed as a mechanic for Tartan Terminals, working on commercial vehicles, mostly yard hustlers. He worked as the only mechanic for Tartan Terminals for six years, and he ran the whole shop (Tr. 61).

The Claimant completed the tenth grade. He served in the Marine Corps for two years, working as a heavy equipment operator; he then went to work on the waterfront (Tr. 81-82). In May 1994, the Claimant worked as a first class pipefitter for Bethlehem Steel, working on pipes, pulling hoses, and doing other activities associated with his job, which required the use of both of his hands. As a result of a 1992 injury to his left hand, he was on modified work in the pipe shop, fabricating and bending pipe, and cutting angles, with another man. The Claimant did this work for approximately three years (Tr. 21).

The Claimant had a serious motorcycle accident in the 1970's, suffering a spiral fracture to his left humerus, and broken ribs; he underwent a muscle tendon transfer in his left arm (Tr. 71). According to the Claimant, he had about 70 percent use of his left arm after this accident (Tr. 71).

On October 9, 2000, the Claimant was down in the berth of a ship, preparing to refuel trucks with a 160 or 180 gallon mobile fuel tank on a pickup truck (Tr. 62). The Claimant had just finished refueling a truck, and was rolling up the hose. The driver, who was pulling a 45 foot trailer, made a left hand turn, but cut too close, and as the Claimant felt the trailer brush his back, he jumped into the back of his pickup, injuring his shoulder. The driver continued for about 50 yards, tearing off the tailgate of the pickup and flipping it in the air (Tr. 63-64). The Claimant made an accident report; he thought that he was "banged up," but otherwise fine, and he did not immediately seek medical attention (Tr. 64).

However, the Claimant experienced progressive pain, and shortly afterward he went to his family doctor, who referred him to an orthopedic surgeon, Dr. Charles Ruland (Tr. 65). On his first visit to Dr. Ruland, the Claimant received a shot of cortisone, which helped his right arm for a few days (Tr. 66-67). However, four weeks later, he again began to have pain (Tr. 67).

On March 2, 2001, the Claimant was working for Tartan Terminals, moving siding on trailers, when he started having pain in his right biceps muscle (Tr. 69). When he got home, he wrapped his arm in an ace bandage, and noticed an indentation in his bicep. He called Dr. Ruland (Tr. 69).

Based on the Claimant's March 1, 2001 MRI, Dr. Ruland told him he had a tear, and suggested rotator cuff surgery, which Dr. Ruland performed on June 1, 2001 (Tr. 72). Dr. Ruland was unable to repair his biceps tendons (Tr. 73). The Claimant then underwent physical therapy for about a month (Tr. 73). By January 22, 2002, Dr. Ruland felt that he had reached maximum medical improvement, and could return to light duty work, lifting no more than 25-30 pounds, and with no overhead lifting. According to the Claimant, with these restrictions, he could not return to his previous job as a mechanic, because there is no part of a yard hustler that weighs less than 30 pounds (Tr. 74).

In January 2002, pursuant to an agreement reached at an informal hearing with the Director, the Claimant entered a work hardening program at Union Memorial Hospital (Tr. 75).

According to the Claimant, the therapist wanted him to lift 50 pounds; they had heated words, and the Claimant quit (Tr. 76).

In the meantime, the Claimant had applied for a disability pension with the Union Steamship Trade Association (Tr. 76). He retired as of April 1, 2002 (Tr. 77). Although he cannot work as a longshoreman, the Claimant feels that there are other jobs he can do. He has not worked since April 2001, and has decided that, if he must start a new career, he will move to Florida (Tr. 78).

The Claimant met with Mr. Dennis, the Employer's rehabilitation expert, who suggested jobs as a car repair estimator (Tr. 78-79). However, the Claimant knows nothing about cars, and last repaired automobiles about 25 years ago (Tr. 79). The Claimant did speak to Andy Randolph at Russell Volkswagen about a job suggested by Mr. Dennis. However, the job, which involved writing service contracts, required full knowledge of automobile repair, and the Claimant's past work on yard hustlers was insufficient (Tr. 80-81). The Claimant also went to a Nissan dealer, but the job was for a service writer, writing service policies on cars. In addition to the fact that the Claimant did not know anything about cars, the job was not available (Tr. 83).

The Claimant discussed the jobs shown on the Employer's job demonstration videotape. According to him, the depiction of the job of driving a fifth-wheel is accurate, as far as it goes, but it does not show the hooking up and lowering of the "landing gear." According to the Claimant, a flatbed has support legs that have to be hooked up to the truck. The legs are very heavy, and must be lined up; a pin needs to be pulled out and shoved back in to hold the legs up (Tr. 84-85). He would not be able to do that procedure. He also noted that when the fifth-wheels unload a ship of roll paper, the driver must get out several times, put the metal plates on the side up or down, and disconnect and connect trailers (Tr. 85-85).

Although the Claimant thought he could operate a "squeezer," as that job was shown on the Employer's video, he felt that the grabbing or jerking would hurt his shoulder, as would taking down an empty propane bottle and connecting a full one (Tr. 87-88). A full bottle weighs over 57 pounds (Tr. 89). In addition, this job is covered by a different union, and he would have to join to get this job. According to the Claimant, there is no light work on the waterfront that he could do (Tr. 92).

The Claimant felt he could work on a car ship, driving cars off of the ship (Tr. 116), but he did not feel that he could drive tractors all day off of a railroad ship (Tr. 116). However, it was his understanding that if he came off of his disability pension, he would have no seniority (Tr. 117).

The Claimant owns seven rental apartments; before his injury, he performed the maintenance on the apartments, but has had to pay people to do it since (Tr. 95-96).

According to the Claimant, he received the letters from Mr. Wrightson and Tartan

Terminal, scheduling him to take the driver certification course, after he went out on pension. He called Mr. Bull, and spoke to his assistant, and was told that he could not come back to the waterfront once he retired, nor could he take classes to qualify as an equipment operator (Tr. 133-134).

Douglas F. Wagner

Mr. Wagner is the field representative for the Steamship Trade International longshoremen pension and benefit association; before that, he was the president of Local 333 (Tr. 29). He testified at the hearing, and also by deposition (EX 60). Mr. Wagner worked as a general longshoreman for about twenty years (Tr. 30). According to Mr. Wagner, the Claimant made an application for a disability pension, and called him about two weeks later to ask him to tear up his application. Mr. Wagner told the Claimant that he needed to come over and sign a form.

The Claimant made a second application for a pension on February 28, 2002, which was granted as of April 1, 2002 (Tr. 30-31).

According to Mr. Wagner, retirement on a disability pension requires a letter stating that a person cannot perform all longshore functions; Mr. Wagner received such a letter for the Claimant (Tr. 31). As part of the application process, the Claimant made an appointment with Dr. Shetty, the physician used by the trustees; Dr. Shetty, and all of the other physicians who examined the Claimant agreed that he could not do all longshore work (Tr. 31-32).

Mr. Wagner stated that the disability pension plan does not prevent a retiree from working somewhere outside the jurisdiction of the ILSTA; however, that person cannot work on the waterfront (Tr. 34).

George Case

Mr. Case is vice president of Tartan Terminals (Tr. 51). He testified at the hearing and also by deposition (EX 61). According to Mr. Case, if Tartan Terminals needed another driver, the qualified man with the highest seniority would get the job (Tr. 52). In order to be qualified, a man must attend a five day class (Tr. 52).

According to Mr. Case, the videotape of the job demonstration is basically representative of the job of driver of a fifth wheel (Tr. 53). This work, which is done outside, is done by Local 333; work as a driver of a squeezer in the warehouse is done by Local 1429. The Claimant was a member of Local 333 (Tr. 53).

Chip Newhart

Mr. Newhart has been the quality and safety manager at Tartan Terminals and Val Terminals since January 2002, after doing consulting for the company since November 2001 (Tr.

138). Previously, he worked in safety and quality for six years for a temporary staffing company that serviced warehouses (Tr. 138-139). Including the time he worked in cash vaults for banks, he has worked indirectly for 15-20 years in quality and safety (Tr. 139). He assisted in narrating the video of the combination driver position (Tr. 140).

Mr. Newhart obtained a list of regularly assigned drivers at Tartan Terminals (Tr. 141, EX 39). These drivers are designated by seniority, with the highest level being "A" (Tr. 142). The list also reflects the wages earned by these drivers over a four month period, which he annualized (Tr. 144).

According to Mr. Newhart, the work load at Tartan Terminals has been very heavy, with a lot of ships coming into port and an increase in the amount of paper products coming into the port (Tr. 145).

James Bull

Mr. Bull is the trustee of the Steamship Trade Association in Baltimore. The Association is an employer's group that is responsible for negotiating contracts with the local unions. Before that, Mr. Bull was a senior operations manager for Universal Maritime, a stevedoring operation in Port Baltimore. He has also worked for Universal and its parent company and subsidiaries in Baltimore and on the West Coast (Tr. 155-157).

Mr. Bull stated that the Employer's pension plan provides that a person with fifteen years on the waterfront who suffers an injury or illness that makes him or her unable to work as a longshoreman is eligible for a disability pension (Tr. 158). Mr. Bull also discussed the provisions that provide that a worker who takes a break in service due to verifiable illness or injury does not jeopardize his seniority (Tr. 159-160). Mr. Bull interpreted these provisions to state that a person who requests and obtains a disability pension and then wants to return would be unable to do so, but that a person who is forced to take a disability pension due to a physical condition would not be leaving voluntarily, and thus their absence would be due to verifiable illness or injury, and their seniority would be protected (Tr. 160).

Mr. Bull felt that the job demonstration video is a fair and accurate representation of the power combination driver position, and if anything, probably presented a less strenuous form of the job (Tr. 161).

Bruce Rielson

Mr. Rielson is the Vice President and General Manager at Tartan Terminals; he has been employed there for eleven years (Tr. 241). According to Mr. Rielson, the video job analysis is a fair and accurate portrayal of the position of power combination driver at Tartan Terminals (Tr. 241).

Mr. Rielson testified that Tartan Terminals unloads barge products , mostly wood pulp, paper on large rolls of half a ton to five tons, lumber bundles, and hardboard from ships, and warehouses the products, which are then distributed to customers all over the country (Tr. 242). He stated that business in 2001 and 2002 was very good, and the company planned to handle one million tons in the current fiscal year. Tartan Terminals has about twelve active drivers (Tr. 242). However, because of the amount of work they have had in the last two years, they are using two to fourteen additional drivers from the union (Tr. 242-243).

Mr. Rielson described two distinct operations at Tartan Terminals. One involves lifting the cargo off of the vessel and onto a lowboy trailer attached to a yard hustler; the drivers then drive the loaded trailer into various warehouses to be unloaded (Tr. 243-244). In the other operation, there are five or six drivers inside the ship with lift trucks with squeezer attachments, who take the rolls from the vessel and place them on an elevator. Five or six drivers are on the pier, and they squeeze the rolls and carry them into the warehouse (Tr. 244). According to Mr. Rielson, the yard hustlers are diesel powered; the trucks used inside a vessel are propane, and the trucks used outside the vessel are diesel (Tr. 245).

Mr. Rielson described the flatbeds used at Tartan Terminals as eight feet wide, with extensions on the sides to accommodate ten foot wide loads. He stated that there are three or four versions of the flatbeds, but normally there are one foot extensions on the side that are raised up, with a supporting piece underneath. Normally, the extensions are lifted with forklifts, although in one version a man could pick up the supporting pieces. But normally the forklift picks it up, and another person pulls out the supporting piece (Tr. 247-249-8). Mr. Rielson stated that the video showed Local 1429 warehouse workers, who make roughly two dollars an hour less than a power combination driver in Local 333, who makes $23.50 an hour (Tr. 248-249). According to Mr. Rielson, the Local 1429 workers work in the warehouse, and the Local 333 workers work outside the warehouse (Tr. 250). Although a person with more seniority than the Claimant would get a job posted by Tartan at the union hall, Mr. Rielson stated that there were ten jobs that had been posted for the past two years that had not been filled (Tr. 258).

Mr. Rielson stated that if the Claimant returned, he would come in at the bottom of the list in terms of seniority, because company seniority is governed by the first date of service with the company (Tr. 246). According to Mr. Rielson, the Claimant would be required to take the power combination driver program to come back to work as a driver for Tartan Terminals (Tr. 248). He stated that Tartan Terminals would be happy to have the Claimant return, as he was a good employee, and the company needs more drivers (Tr. 251). He stated that most of the propane trucks used by Tartan drivers are used in the hold of the ship; they have drivers who requested not to be used in the hold, and they are used on the pier (Tr. 251).

Baltimore City Hospitals

The exhibit file includes records from Baltimore City Hospitals in connection with the Claimant's May 1978 motorcycle accident (EX 48). They note that the Claimant fractured his left

humerus, and had a stiff left shoulder with subluxation, radial nerve palsy resulting in a dropped wrist, and left shoulder, arm and forearm atrophy.

Dr. Stuart J. Gordon

Dr. Gordon examined the Claimant on November 28, 2001 (CX 1). He described the Claimant's injury, as well as his treatment by Dr. Schmidlein and Dr. Ruland, and his evaluation by Dr. Keehn and subsequent surgery. The Claimant told Dr. Gordon that he was not having significant pain while resting, but that any type of effort caused right shoulder pain, and he had difficulty working overhead or with any type of heavy lifting. Dr. Gordon indicated that the Claimant had difficulty putting his vehicle into gear, and reaching for and opening doors.

Dr. Gordon discussed the Claimant's 1978 motorcycle accident, which caused a left proximal humerus fracture, and subsequent tendon transfers. He indicated that the Claimant initially thought that he was not having significant problems with his left arm but after his recent injury, when he began to rely on his left arm, he realized that he was much weaker than he thought, and had difficulty with any type of heavy lifting or work of a significant fashion with his left arm.

On examination, Dr. Gordon found that there clearly was atrophy about the Claimant's right shoulder girdle, as compared to the left. With the left upper extremity, the Claimant's range of motion was full, except for forward flexion to only one hundred and sixty degrees. The Claimant had no gross instability about his left shoulder; there was guarded but full range of motion of the left elbow.

The Claimant had multiple scars on his left forearm and hand, consistent with his tendon transfer reconstruction. He had clear weakness on wrist dorsiflexion, only to about neutral. He could only extend his fingers to the neutral plane. The Claimant had evidence of compromised wrist flexion due to the tendon transfer, which appeared to be from the flexor carpi ulnaris. He had intact but weak flexion of his wrist and fingers, and atrophy of his left forearm diffusely, especially over the dorsal wad. The sensory examination through the Claimant's left upper extremity showed decreased sensation through the distribution of the radial nerve.

The Claimant had a scar through his lateral right shoulder, and could only forward flex to one hundred and twenty degrees, and abduct to seventy degrees. He had internal rotation fully, but external rotation to forty degrees, and extension only to thirty degrees. The Claimant had full adduction, and no gross instability. He had a guarded drop arm test, and an obvious deformity consistent with a proximal biceps rupture. Distally, he had intact motors, and his sensory was intact. The Claimant's right shoulder girdle was "generally weak of a grade."

Dr. Gordon's impression was that the Claimant had a right rotator cuff tear, adjacent subsequent proximal biceps tendon rupture, and residual disability. As a result of his motorcycle accident in 1978, he had suffered a left humerus fracture with residual radial nerve deficit,

subsequent tendon transfer, and residual disability. He felt that the Claimant clearly could not work in a full duty capacity as a longshoreman, nor could he do any significant type of heavy lifting. Dr. Gordon doubted that the Claimant would ever be able to do so, based on the combination of his residual disability from the rotator cuff repair, and his left radial nerve deficit. Therefore, he concluded that the Claimant was permanently unable to return to perform unrestricted work as a longshoreman.

Dr. Y. K. Shetty

Dr. Shetty provided a Medical Examination Report for the Steamship Trade Association dated March 7, 2002 (CX 2). After examining the Claimant, he found him to be totally and permanently disabled from working in the longshore industry. His diagnosis was status post right rotator cuff tear and right biceps tendon rupture. He indicated that he had reviewed information from Dr. Gordon and Dr. Keehn, and that they agreed with his opinion.

Dr. Charles M. Ruland

Dr. Ruland treated the Claimant from November 2000 until (CX 6(c)). After his initial examination of the Claimant on November 21, 2000, and reviewing his MRI and x-ray films, Dr. Ruland concluded that he had right shoulder impingement syndrome. He injected Cortisone and Lidocaine, and gave the Claimant a prescription for Relafen. The Claimant was to begin physical therapy.

Although the Claimant's pain almost resolved with the injection, by January 16, 2001 it had recurred. The Claimant described it as a dull aching pain, radiating into his upper arm. Dr. Ruland again injected Cortisone and Lidocaine.

At the Claimant's March 20, 2001 visit, Dr. Ruland noted that he still complained of increasing pain in his right shoulder. He indicated that two weeks earlier, the Claimant had a biceps rupture. On examination, Dr. Ruland noted the obvious biceps tendon rupture. Additionally, the March 1, 2001 MRI showed evidence of a complete biceps tendon rupture, and a one cm. tear distal insertion of the rotator cuff tendon. Dr. Ruland felt that surgery was required to repair the rotator cuff.[1] Dr. Ruland felt that the Claimant tore his rotator cuff at work on October 9, 2000, and about 10-14 days later, he re-injured his shoulder while lifting a heavy plate, probably rupturing his biceps at this time, which had been partially torn at the initial injury. He felt that the biceps tendon rupture, as well as the rotator cuff tear, were directly related to the October 9, 2000 injury. Dr. Ruland completed a form indicating that the Claimant could return to

[1] An MRI performed at Dr. Ruland's request on March 1, 2001 showed a moderate rotator cuff tendinopathy with distal supraspinatus tear, with 1 cm. gap (CX 5). X-rays ordered by Dr. Ruland on November 21, 2000 (CX 5). There were no fractures, subluxations, or degenerative changes in the right shoulder.

work on October 29, 2001, with no overhead lifting, or lifting over thirty pounds (CX 6).

Dr. Ruland performed surgery on the Claimant on June, 2001 (CX 3). Specifically, he performed a right shoulder open rotator cuff repair, right shoulder arthroscopy with extensive debridement of a partial rotator cuff tear and a biceps tendon rupture stump, and an excision of the inferior third of the distal one cm. of the clavicle. His postoperative diagnosis was right shoulder complete rotator cuff tear with significant partial thickness tearing in the supraspinatus tendon; impingement syndrome; and complete rupture of the biceps tendon with 1.5 cm. biceps tendon stump.

At the Claimant's October 23, 2001 visit, Dr. Ruland indicated that he seemed to be doing well, despite his complaints of pain (EX 9). He felt that the Claimant could return to modified duty beginning October 29, 2001, restricted to no repetitive overhead lifting, and no lifting over thirty pounds. Dr. Ruland completed a form indicating that the Claimant was temporarily totally disabled but could return to work on October 29, 2001, with no overhead lifting, or lifting over thirty pounds (CX 6). He did not recommend any additional treatment, other than the Claimant's home exercise strengthening program. He did not feel that the Claimant had reached maximum medical improvement, which would occur in about three months.

Dr. Ruland completed a "Physical Capabilities Index" on November 27, 2001 (EX 8). He indicated that the Claimant was not capable of returning to regular duty work, and his anticipated return was uncertain, pending the results of the FCE. Although the Claimant had not reached maximum medical improvement, he was capable of returning to modified light duty work.

At the Claimant's January 22, 2002 visit, the Claimant was still having some shoulder pain with activities and sleeping on his shoulder (EX 7). After examining the Claimant, Dr. Ruland stated that he had reached maximum medical improvement, although he thought there was some chance that he could improve the strength in his right shoulder. He felt that the Claimant was going to have to live with occasional pain; he discharged him from care.

Dr. Robert D. Keehn

Dr. Keehn saw the Claimant on April 16, 2001 for evaluation of his right shoulder injuries sustained on October 9, 2000 (EX 6). The Claimant provided Dr. Keehn with his x-ray and MRI films. Dr. Keehn noted no previous history of problems with the Claimant's right shoulder. He was involved in a motorcycle accident in 1978, in which he injured his left upper extremity; he had a fracture, and radial nerve injury, and needed tendon transfers. Dr. Keehn reported that about a week to ten days after his October 9, 2000 injury, the Claimant felt a snap in his shoulder, and sustained a biceps rupture.

On examination of the Claimant, Dr. Keehn noted atrophy over the left upper extremity, but excellent range of motion of the left shoulder, without discomfort. The Claimant had generalized tenderness over the anterior aspect of his right shoulder, and positive findings

consistent with proximal biceps tendon rupture. The Claimant had arc pain above 90 degrees, and a positive impingement test. His MRI showed a small rotator cuff tear of the supraspinatus, which was consistent with moderate rotator cuff tendinopathy with distal supraspinatus tear, with a one cm. gap. Dr. Keehn also reviewed other medical records.

In Dr. Keehn's opinion, the Claimant sustained traumatic injury to his right shoulder, causing a right rotator cuff tear; the right biceps tendon rupture occurred seven to ten days later. He noted that it is common to see biceps tendon injuries along with rotator cuff problems.

Noting that the Claimant had undergone a conservative approach with medication and injections, Dr. Keehn stated that he was a candidate for rotator cuff repair. He agreed with Dr. Ruland that the biceps tendon rupture did not require repair. In his opinion, the surgery was causally connected to the Claimant's October 9, 2000 injury. He anticipated that the Claimant would not return to work for a minimum of eight to twelve weeks after surgery.

In a report dated May 9, 2001, Dr. Keehn indicated that he had reviewed additional reports and documents (EX 6). He concluded, as he did in his April 16, 2001 report, that the Claimant's complaints of impingement syndrome and rotator cuff tear were causally connected to his October 9, 2000 work related injury. He noted that bicep tendon ruptures can be connected with rotator cuff tendonitis or tear, and according to the Claimant, the biceps rupture occurred about a week to ten days after his October 9, 2000 injury. Dr. Keehn felt that the biceps tendon rupture was an isolated injury, and that no surgical intervention was necessary.

Dr. Keehn saw the Claimant on August 31, 2001 after he underwent surgery for rotator cuff repair and arthroscopy (EX 4). He felt a lot better, but still had restricted and decreased strength. After taking an x-ray, Dr. Keehn concluded that the Claimant had received a good decompression. However, he still had restriction of motion and weakness in his right shoulder. Noting that it could take up to six months for maximum improvement, Dr. Keehn stated that the Claimant needed to continue exercises and strengthening for his right shoulder. He felt that a sedentary job, or a light duty job with no lifting over ten pounds above shoulder level, would be reasonable for the Claimant.

Dr. Keehn saw the Claimant on December 12, 2001 for evaluation of his right shoulder injuries (CX 4, EX 3). The Claimant reported to Dr. Keehn that his right arm was almost as bad as it was before the surgery by Dr. Ruland. He still had pain at night in the shoulder, and some complaints about his biceps and neck. On examination of the Claimant, Dr. Keehn noted a deformity along his left forearm from a previous radial nerve injury; the Claimant had full range of motion of his left shoulder without complaints. Examination of the Claimant's right shoulder showed slight dimpling about the incision with motion of the shoulder, and generalized discomfort. The Claimant had forward flexion of 180 degrees, and abduction of 140 degrees. His internal rotation was satisfactory, but external rotation was restricted from 0 to 80 degrees. His extension and internal rotation was to T12 on the left, and to L4 on the right. The neurovascular examination of this extremity was intact, with no subjective weakness.

In Dr. Keehn's opinion, the Claimant had reached maximum medical improvement, and did not need further treatment. He recommended that the Claimant return to work in a light duty capacity, without overhead lifting, and no lifting with the right upper extremity above 25 pounds. He noted that the Claimant indicated that there was no work in this capacity.

Dr. Keehn signed a prescription for six weeks of work hardening for the Claimant on February 20, 2002 (EX 2).

Dr. Keehn also saw the Claimant on June 24, 2002 (CX 4, EX 1). The Claimant reported that his right shoulder still ached, and kept him up at night. After examining the Claimant, reviewing records, and evaluating video job analyses, he stated that the Claimant was able to perform the job of driver as demonstrated in the video. He felt that it was reasonable to restrict the Claimant to no lifting above 50 pounds from the floor to the waist.

Curtis Work Rehabilitation Services

The Claimant underwent a functional capacity evaluation on January 4, 2002, at Curtis Work Rehabilitation Services, in order to determine his functional abilities and assess his potential to return to work as a longshoreman (CX 7). It was determined that he could not physically meet those job demands, which were heavy. He was restricted to medium work when lifting from the floor to the waist, and sedentary when lifting above waist level; he could carry only 40 pounds. The report indicated that the Claimant demonstrated consistent effort.

The Claimant was scheduled for participation in a work hardening program, but was discharged on February 27, 2002 after he attended for two half days, and then indicated that he did not want to participate (CX 8).

Mark Edward Dennis

Mr. Dennis is a vocational counselor who was contacted by Ms. Beth Straw Thomas, of the Shafer Company, in January 2002 to conduct a vocational assessment of the Claimant (Tr. 173). He met with the Claimant on January 30, 2002 for several hours, and administered educational tests that confirmed that the Claimant was at the 12th grade level in reading and writing, and the junior high level in math (Tr. 174-175).

According to Mr. Dennis, he and the Claimant hit it off very well; Mr. Dennis felt that the Claimant had a great personality, and that he was sharp and very communicative (Tr. 178-179). After this initial meeting, he concluded that the Claimant's strengths included his positive personality, his inter-communication skills, and his excellent work history (Tr. 179). His weaknesses, which Mr. Dennis felt could be overcome, included his lack of education (Tr. 180).

In his report dated February 22, 2002, Mr. Dennis listed a number of positions that would be suitable alternative employment for the Claimant (Tr. 180-181, EX 21). The positions identified by Mr. Dennis are in the sedentary to light duty category, and according to Mr. Dennis, take into account the Claimant's thirty years of experience as a shop mechanic (EX 21). They include Service Writer, Automotive; Shop Supervisory, Any Industry; Leased Machinery/Equipment Service Supervisor; Machinery/Equipment Leasing Manager; Boat and Marine Sales Representative; and Marine Supplies Sales Representative. Mr. Dennis felt that the Claimant's ability to run things, and his orientation to detail, were transferrable skills that could apply to a shop supervisor position (Tr. 181). He felt that the service writer position was the most transferrable (Tr. 182-183). Both Dr. Ruland and Dr. Keene signed off on this position (Tr. 186).

In his report dated June 18, 2002, Mr. Dennis concluded that the Claimant's employability status and wage potential, which was based on his thirty years of work as a mechanic, was between $32,188 to $48,776 annually (EX 17). He noted that the primary reason that the Claimant was not qualified for a wage commensurate with his pre-injury wage was because of his limited education, and not his physical limitations. Rather, his employability status was based on his extensive work history and transferrable skills.

Mr. Dennis identified as available employment positions in the automotive service writing category, and stated that these positions were currently available within the Baltimore metropolitan area with a wage range of $30,000 to $60,000 a year. Based on the Claimant's thirty years of work as a mechanic, he felt that the Claimant was qualified to work as an auto service writer, and that he could also transition into management. He identified ten positions reasonably available, which were submitted to Dr. Ruland and Dr. Keehn, who approved them.

Mr. Dennis took a film depicting the power combination driver position at Tartan Terminals, asking the drivers to give him the best representation of that job (Tr. 190, EX 13).[2] In his report on the combination driver video job analysis, Mr. Dennis noted that a specialized driver's license and certification were required. Certification was obtained either by grandfathering through work experience, or through a certification training process. He stated that due to the Claimant's work experience and tenure, it was most probable that his certification could be grandfathered.

Mr. Dennis also contacted Mr. Chip Newhart after the film was made to ask if there were any additional job tasks that were not included on the video job analysis (EX 16). According to Mr. Dennis, Mr. Newhart told him that the only job task not included on the film was the loading of the propane tank, which weighed 45 pounds full, on the back of the truck. Mr. Newhart stated that this task could be accommodated by having other longshoremen assist. Mr. Newhart confirmed that the Claimant could work as a driver for as many hours as he chose, and that the

[2] I have reviewed this videotape, which shows an employee operating a yard hustler, and employees in the warehouse operating various sizes of "squeezers" attached to forklifts.

base rate was $23.50 an hour. Mr. Dennis concluded that the video job analysis was a fair and accurate representation of the job duties, and as both the treating and consulting physicians approved the report, there was suitable gainful alternative employment available with the Employer (Tr. 191 193; EX 13, 14).

Mr. Dennis also conducted an updated labor market survey after his July 1, 2002 report (EX 51). Based on the Claimant's thirty years of work experience as a shop mechanic, his educational level, including a GED, and his reading, writing, and math ability, and his transferable skills, he identified suitable gainful alternative employment in the form of auto service writer positions, which Mr. Dennis felt the Claimant had the realistic ability to obtain, as well as similar related types of positions such as auto service advisors and auto sales. Mr. Dennis re-contacted the ten employers he listed in his earlier labor market report, and found two that were available. He also identified five additional available service writer positions. Based on his findings, Mr. Dennis concluded that there was available employment for which the Claimant was qualified and physically capable of performing.

Mr. Dennis prepared a follow-up report on August 15, 2002, indicating that one of these positions was filled, and one was still available (EX 51)

Beth Straw Thomas

Ms. Straw Thomas is employed as a regional manager by the Shafer Companies; she handles the insurance claims for Tartan Terminals (Tr. 215). She testified that, based on Dr. Keene's deposition testimony indicating that the Claimant was restricted to light duty, the Employer paid the Claimant temporary total disability compensation from April 5, 2001 through June 1, 2001 (Tr. 216). She confirmed that the check for this amount had been issued on September 27, 2002, and mailed the previous Monday (Tr. 217).

According to Ms. Straw Thomas, she, the Claimant, and the Claimant's attorney agreed, at the informal conference, that the Claimant would be enrolled in a work hardening program at a facility of his choice (Tr. 218). The Claimant chose to undergo work hardening at Union Memorial Hospital, which was the same place the functional capacity evaluation was performed (Tr. 218). Even though Dr. Keehn indicated that by December 2001 the Claimant had reached maximum medical improvement, and Dr. Ruland so indicated in January 2002, the Employer continued to pay the Claimant temporary total disability benefits, through the functional capacity evaluation and work hardening. Ms. Straw Thomas learned on March 6, 2002, that work hardening had never taken place, and the Claimant's benefits were terminated on March 10, 2002 (Tr. 219).

According to Ms. Straw Thomas, at the informal conference on February 6, 2002, she agreed, on the Employer's behalf, to pay temporary total disability benefits up to February 6, 2002, which had been previously discontinued when the Claimant failed to keep two scheduled functional capacity evaluation appointments (Tr. 221). She indicated that there was a delay in

scheduling the work hardening, because the Center required a prescription written by an orthopedic physician. Neither Dr. Ruland nor Dr. Gordon would give her a prescription for work hardening, but she got a prescription from Dr. Keehn, which she forwarded to the Curtis Rehabilitation Center at Union Memorial Hospital (Tr. 222, 224).

The exhibit file includes a letter to the Claimant from Bruce Wrightson at Tartan Terminals, dated June 18, 2002, indicating that he was scheduled for Power Industrial Truck Operator Training on June 25, 2002 (EX 37), and a second letter to the Claimant from Bruce Wrightson, dated July 10, 2002, indicating that he had been scheduled for Power Industrial Truck Operator Training on July 16, 2002, and that the STA indicated that he would be paid at the basic driver rate of $23.50 an hour for the 32 hours of training (EX 31). On July 11, 2002, Ms. Straw Thomas wrote to counsel for the Claimant, indicating that the next scheduled course for the Power Industrial Truck Operator Training would begin on July 16, 2002 (EX 30). She stated that the Employer would pay temporary total disability benefits to the Claimant while he was enrolled in the training course, if the Steamship Trade Association did not pay him.

Craig Poorbaugh

Mr. Poorbaugh is an investigator at Comprehensive Investigations. He has been an investigator for fifteen years, and is licensed in the State of Maryland (Tr. 226). His firm was requested to conduct surveillance of the Claimant (Tr. 227). As part of that surveillance, Mr. Poorbaugh took video of the Claimant on June 24, 2002, when he entered a building for an appointment (Tr. 228), and on August 1, 2002, of the back of the Claimant's residence from a boat (Tr. 229). According to Mr. Poorbaugh, when they first arrived on August 1, 2002, they saw a white board lying on the steps leading into the Claimant's yard. Later in the morning they saw the Claimant come out of his house, walk down the steps, and with both hands lift the board up and lean it against a railing or bushes next to the steps. This is not shown on the video, because there is a slight time delay while the camera is turned on and is ready to go, and by the time the camera came on, the Claimant had already lifted the board up and was working on it (Tr. 230). On reviewing the tape, Mr. Poorbaugh realized that the board was a countertop with a sink basin, and a garbage disposal; in his opinion, the Claimant was removing the garbage disposal from the bottom of the sink (Tr. 232).

I have reviewed the videotapes taken by Mr. Poorbaugh, which show the Claimant walking in and out of a building; picking up trash and empty trash cans in his yard; supposedly driving a boat; and bending over the board described by Mr. Poorbaugh.

Charles Smolkin

Mr. Smolkin is a vocational rehabilitation consultant, and president of Smolkin Vocational Services, Inc. (Tr. 264). He met with the Claimant on August 6, 2002, after reviewing his file (Tr. 264-265). Although he initially questioned the fairness of the conclusions of Mr. Dennis,

thinking that they reflected bias, after hearing him testify, he concluded that Mr. Dennis was very sincere, and the bias was not personal, but was in what he was allowed to do as a vocational expert (Tr. 265). Specifically, he questioned Mr. Dennis's conclusion that a person who was a mechanic had developed skills that were transferable to a sales position (Tr. 266). He did agree with Mr. Dennis that it was possible that the Claimant could perform the job of service adviser, but he stated that almost no major employer will consider a person who might have a disability, or who is working through a rehabilitation counselor (Tr. 266). He also felt that the Claimant would have to overcome his inferior math skills, as the job of service adviser involves a lot of math. Additionally, the service advisor job is fully computerized, and the Claimant has no computer expertise. Finally, while the Claimant has an outgoing personality, he is not dominant; the automotive service advisor's position is sometimes emotionally exhausting, as they spend a lot of time interacting with the public, in particular with stressed, irate, or dissatisfied customers. In contrast, the Claimant has a need for orderliness, which is the opposite environment. Mr. Smolkin felt that the Claimant could have a very bad reaction to someone who came in with complaints. He felt that to be fair, the Employer should have offered the Claimant computer courses and math services, and possibly management or sales courses, to alleviate these problems (Tr. 267-268).

Mr. Smolkin felt that the Claimant would fail as a service advisor, even if there were an employer to give him the opportunity, without math, a GED, computer skills, auto skills, or sales skills. In his 33 years of experience, he has never actually placed someone in a service advisor job, although he has arranged hundreds of interviews for the position (Tr. 269-270). Mr. Smolkin felt that the Claimant could perform security monitor jobs, or some assembler jobs, making maybe $20,000 a year, although such jobs would be insulting to him (Tr. 273).

In his report dated August 12, 2002, Mr. Smolkin noted that he was retained to determine if the vocational recommendations of the Employer were suitable for the Claimant (CX 11). He noted that in his previous work activity, the Claimant exhibited an occupationally significant combination of skills and abilities as an industrial maintenance mechanic, and would be expected to have knowledge of tools, machines, materials and methods used in industrial mechanical work, and the ability to read scale drawings or blueprints, use shop math, and have a high level of coordination with his eyes, hands, and fingers for the use of hand tools in repairing equipment. His work was heavy in nature.

Mr. Smolkin felt that many of the Employer's conclusions about the Claimant's work potential were based on a faulty interpretation of the facts. Specifically, he felt that the identification of transferable skills was inaccurate, as was the interpretation of residual limitations. Additionally, the educational level attributed to the Claimant was not correct. Although the Claimant had a high level of craft ability as demonstrated by his work history, Mr. Smolkin felt that the transferability of these skills was limited by his lack of educational achievement and his sedentary physical limitations. He felt that the Claimant was limited to elemental types of jobs, with a limited income potential of no more than $20,000 a year. In his opinion, the lack of a reliable foundation negated the vocational recommendations and salary ranges of the jobs identified by the Employer.

II. Stipulations

The parties have stipulated, and based on the record I find the following:

I. 33 U.S.C. § 901 et seq (hereinafter the Act) is applicable to this claim.

II. The Claimant and Employer were in an employer/employee relationship at the time of the accidents or injuries.

III. The condition of the Claimant's right upper extremity is causally related to the accidents or injuries.[3]

IV. The dates of the accidents or injuries were October 9, 2000, and March 2, 2001.

V. The Employer was provided with timely notice of the injuries.

VI. The date of maximum medical improvement was January 22, 2002.

VII. The Claimant's filing of the notices of claim was timely.

VIII. The Claimant's average weekly wage was $1,862.25.

III. Issues

The issue before me is the nature and extent of the Claimant's disability with respect to his right upper extremity.

IV. Discussion

It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences from the evidence. *Wendler v. American National Red Cross*, 23 BRBS 408, 412 (1990). It is also well-established that the administrative law judge is not bound to accept the opinion or theory of any particular medical examiner. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989).

The burden of proving the nature and extent of disability rests with Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). Disability is generally

[3] The Employer's LS 18 indicates that the causal relationship of the biceps tendon injury, which occurred on March 2, 2001, is in dispute. However, the Employer concedes that this injury is either a result of the Claimant's October 9, 200 injury, or that it occurred on March 2, 2001. In any event, I find, based on the reports by Dr. Keehn and Dr. Ruland, that the Claimant's biceps tendon rupture was causally related to his employment.

addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America,* 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin,* 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan,* 110 F.2d 840 (1st Cir. 1940). A claimant who shows that he is unable to return to his former employment establishes a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane v. Hayes,* 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.,* 25 BRBS 128 (1991).

"Total disability" is defined as the complete incapacity to earn pre-injury wages in the same work as at the time of injury, or in any other employment. "Usual" employment is defined as the Claimant's regular duties at the time he was injured. Here, if the Claimant establishes that he cannot return to his previous work as a heavy equipment mechanic, he has established a *prima facie* case of total disability.

There is no dispute among the physicians who have examined the Claimant that he cannot return to his regular and usual employment. Nor does the Employer challenge this conclusion, conceding that the Claimant cannot return to his prior occupation as a heavy equipment mechanic (Employer's brief at 6, 10).[4] Thus, I find that the Claimant has established a *prima facie* case of total disability.[5]

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[4] The Employer confuses the Section 920(a) presumption, that the Claimant's injury arose out of and in the course of his employment, with the Claimant's burden of establishing a *prima facie* case of total disability (Employer's Brief at 5-6). The Claimant has successfully invoked the Section 920(a) presumption, as the Employer has conceded, and thus the statutory presumption has <u>not</u> been rebutted, nor has it "fallen out of the case." Moreover, the Employer has conceded, and I have found, that the Claimant cannot return to his regular longshore employment, and thus under the Act the Claimant has established a *prima facie* case of total disability.

[5] In this context, the Employer's emphasis on video surveillance of the Claimant working on a garbage disposal, and testimony from Mr. Poorbaugh, the investigator, that the Claimant

As I have found that the Claimant cannot return to his former employment as a heavy equipment mechanic, the burden now shifts to the Employer to prove the existence of suitable alternate employment for the Claimant. Relevant factors in making such a determination include the Claimant's age, background, employment history and experience, and intellectual and physical capabilities, as well as the reasonable availability of jobs "in the community for which the Claimant is able to compete and which he could realistically and likely secure." *Washington Metropolitan Area Transit Authority,* 36 F.3d 375 (4th Cir. 1994), *quoting Trans-State Dredging v. Benefits Review Board,* 731 F.2d 199, 201 (4th Cir. 1984), *quoting New Orleans (Gulfwide) Stevedores v. Turner,*661 F.2d 1031, 1042-43 (5th Cir. 1981).

Mr. Dennis identified a number of positions in the sedentary to light duty category that he felt were consistent with the Claimant's thirty years of experience as a shop mechanic. Of these, he felt that the Claimant's skills would most easily transfer to the "Automotive Service Writer" position. Thus, he identified ten employers with such positions available, with a salary range of $30,000 to $60,000 a year.[6] Both Dr. Ruland and Dr. Keehn signed off on these positions. The job description for these ten positions includes providing customers with estimates for repairs, writing repair and service orders, customer liaison with mechanics, and advising and contacting customers about needed repairs and estimates. Three of these positions require a high school diploma or GED; six prefer, but do not require, a high school diploma or GED; and one has no education requirements. Only one, the position with Russell Volkswagen, which has no education requirements, provides for on the job training.[7]

According to Mr. Dennis, as of August 14, 2002, only two of these ten positions were still available; as of August 15, only one was still open. He identified five additional positions, but his report does not indicate if he actually contacted these employers, nor does it describe the job duties or the experience and educational requirements of the additional five positions.

Mr. Dennis's identification of these positions as suitable gainful alternative employment is based on the Claimant's thirty years of work experience as a shop mechanic, his educational level,

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lifted a countertop and leaned it on a railing, and traveled over 40 miles an hour on his boat, is puzzling. Certainly the Claimant's participation in these activities does not establish or even suggest that he is capable of returning to his former employment. Nor, without more, does it have any bearing on the Claimant's ability to perform the physical tasks involved in the combination driver position, identified by the Employer as suitable alternative employment.

[6] Although Mr. Dennis identified a number of other positions that he felt were within the Claimant's physical and vocational capabilities, he did not identify any specific job openings for these positions, and I do not find them to be suitable alternate employment.

[7] In fact, the Claimant testified that he contacted Russell Volkswagen, but was told that the job required full knowledge of auto repair, and that his past work on yard hustlers did not qualify.

including a GED, his reading, writing, and math ability, and his transferable skills. As Mr. Dennis conceded at the hearing, the Claimant did not in fact obtain a GED; his reading and writing skills are at the twelfth grade level, while his math skills are below the sixth grade level. In his report dated February 22, 2002 (EX 21), Mr. Dennis stated that the Claimant's transferable skills, based on his work history, included knowledge of truck and *auto parts* and maintenance; the ability to use an assortment of small hand tools, including electric tools, for repair; the ability to prepare itemized work orders of cost listings of parts and labor for truck and auto parts and repair; the ability to supervise and coordinate the activities of shop mechanics; the ability to greet customers and identify needed truck repairs; the ability to rent or lease heavy equipment machinery, tools, and equipment; and the knowledge of marine and boat supplies for sales purposes.

However, the Claimant testified that he has not worked on automobiles for 25 years. Mr. Dennis did not explain how the Claimant's work experience maintaining and repairing heavy shop equipment equipped him with the knowledge of auto parts, repair, and maintenance necessary to a service writer position. Nor did he indicate how he thought that the Claimant, who worked for six years as the sole mechanic at Tartan Terminals, developed the ability to supervise and coordinate the activities of other shop mechanics, or to deal with customers in an auto service position.

In contrast, Mr. Smolkin concluded that, although the Claimant had a high level of ability as an industrial maintenance mechanic, the transferability of these skills to an automotive service writer position was limited by his poor math skills, as well as his lack of a GED, computer skills, automotive skills, and sales skills.

Based on the above, I find that the Employer has not established that the position of automotive service writer is a position that is reasonably or realistically available to the Claimant.

Nor do I find that the Employer has established that the position of power combination driver constitutes suitable alternative employment for the Claimant. Although Mr. Dennis indicated that it was "most probable" that the Claimant's certification could be grandfathered, Mr. Case and Mr. Rielson both testified that the Claimant would have to take the five day course for power combination drivers before he could perform that job.

While the Claimant took this course, he would be paid the regular wage for combination drivers. But according to Mr. Bull, the Claimant cannot be paid a salary as a longshoreman unless he comes off his disability retirement, and is able to return to work on the waterfront. To do so, the Claimant would have to demonstrate to the union board of trustees that he is physically capable of performing all longshore jobs.[8] The evidence of record is overwhelmingly to the contrary: Dr. Shetty has certified that the Claimant was unable to work as a longshoreman, and

[8] Under the STA-ILA Pension Plan, a member is considered to be totally and permanently disabled if the Trustees find, based on medical evidence, that the member is "permanently prevented from engaging in any further employment in the longshore industry" (EX 41, p. 8).

Dr. Ruland, Dr. Keehn, and Dr. Gordon all agree that the Claimant cannot return to his former work as a longshoreman.

There is also a dispute as to whether the position of power combination driver is within the Claimant's physical capabilities. Both Dr. Ruland and Dr. Keehn signed off on the job description prepared by Mr. Dennis, as well as the video depiction of this position. The Claimant acknowledged that he could perform the position as depicted on the video. However, according to the Claimant, in the "real world" of the waterfront, it is necessary for a power combination driver to perform tasks that may not necessarily be strictly within his job description. These include lifting and lowering the sides of flatbeds, lowering legs on trailers, and changing propane tanks.

But even assuming that the Claimant was physically capable of working as a power combination driver, and was able to come off his disability retirement by establishing that he was physically capable of performing all duties of a longshoreman, and thus was eligible to return to work on the waterfront, and he was able to obtain certification as a power combination driver, the issue arises as to whether he would have the necessary seniority to obtain a job as a power combination driver. The Employer argues that the Claimant's collective bargaining agreement plan provides that a person who is forced to take a disability retirement pension due to a physical condition does not leave "voluntarily," and since his break in service is due to a verifiable illness or injury, his seniority would be protected if he returned to work. I have reviewed the provisions relied on by the Employer, and I interpret them differently (EX 55). That agreement, at part 22 - Seniority System, Section I.4., Definitions, provides that employees may receive credit for allowable breaks in service due to absence due to verifiable illness or injury, military service, authorized leave of absence, absence due to service in a supervisory or managerial position, or as an officer of the ILA or its subdivisions, or employment by any fund jointly administered by the STA and the ILA. It also provides, at section g., that "The seniority of any employee shall cease with respect to priority of employment in the event he voluntarily quits, resigns or retires from the industry."

Clearly, this section is intended to insure that employees who are away from the waterfront for temporary periods of time (hence "break in service") for the enumerated allowable reasons do not suffer loss of seniority while they are gone. But this section also makes it clear that an employee who quits, resigns, or retires, in other words, who makes a conscious decision to cease work as a longshoreman permanently, forfeits his seniority.[9] I note that Mr. Rielson, the Vice President and General Manager at Tartan Terminals, testified that if the Claimant returned, he would come in at the bottom of the list in seniority; and Mr. Wagner, the field representative

[9] The Employer's argument that the Claimant was forced to retire on disability, and thus that his retirement was not "voluntary," is strained at best, and ultimately irrelevant: I interpret the bargaining provisions to provide that a longshoreman who makes the decision to leave the industry, as opposed to a longshoreman who is "absent" for the specified reasons, loses his seniority, whether that decision was "voluntary," or arguably forced on him by circumstances.

for the STA-ILA, testified that a person who comes off of a disability retirement loses his seniority.

Finally, there is no persuasive evidence that there are jobs reasonably available to the Claimant at Tartan Terminals as a combination power driver. Mr. Rielson testified that there have been ten jobs posted at the union hall for the past two years that had not been filled. However, he did not give any details about these jobs, and in particular, whether they were jobs that were filled by Local 333 (of which the Claimant was a member) or Local 1429 (of which he was not a member).

Thus, even assuming that he is physically capable of performing the power combination driver position, the Claimant must take the five day certification course; but he cannot take this course unless he is certified as physically able to perform **all** longshore duties, and his return to work is approved by the union trustees. Even if he overcomes these obstacles, he would be at the bottom of the list in terms of seniority, and would have to compete for jobs that may or may not exist at the union hall.

Under these circumstances, I find that the Employer has not established that the position of power combination driver is a suitable alternative position that is reasonably available to the Claimant, and that he could realistically secure and perform.

The Employer argues that the Claimant has not acted in good faith, because he refused to participate in work hardening, and did not diligently attempt to obtain employment. However, vocational rehabilitation is not a factor to be considered in determining the extent of disability, as neither the Act nor the regulations require that the Claimant undergo vocational rehabilitation training. *Hayes v. P & M Crane Co.,* 23 BRBS 389 (1990), *vacated on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991); *Mendez v. Bernuth Marine Shipping*, 11 BRBS 21, 29 (1979), *aff'd*, 638 F.2d 1232 (5th Cir. 1981). Moreover, the Claimant's duty of diligence in seeking employment does not displace the Employer's initial burden of establishing suitable alternate employment. *Roger's Terminal & Shipping Corp. v. Director, OWCP,* 784 F.2d 687, 691, 18 BRBS 79, 83 (CRT) (5th Cir.), *cert. Denied*, 479 U.S. 826 (1986); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

As I have found that the Employer has not established the existence of suitable alternate employment, it is irrelevant that the Claimant may not have diligently explored the jobs identified by the Employer, or that he may not wish to return to work on the waterfront. Indeed, the Claimant has indicated that he would like to find a job, and plans to move to Florida to try and start a new career. However, as the Employer has not established the existence of suitable alternate employment, until such time as the Claimant's condition changes, or he in fact becomes employed, under the Act he remains permanently disabled.

ORDER

On the basis of the foregoing, Employer shall:

A. Pay the Claimant temporary total disability compensation benefits from October 9, 2000 through January 22, 2002, based on an average weekly wage of $1,862.25.

B. Commencing on January 22, 2002, pay to Claimant permanent total disability compensation benefits, based on an average weekly wage of $1,862.25.

C. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his injuries of October 9, 2000, and March 2, 2002.

D. Pay to the Claimant all medical benefits to which he is entitled under the Act.

E. Pay to the Claimant's attorney fees and costs to be established by a supplemental order.

F. The District Director shall perform all calculations necessary to effect this Order.

SO ORDERED.

LINDA S. CHAPMAN
Administrative Law Judge